IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Edgar Allen West, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on July 2, 1958.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (Appellants' Appendix 12a). The opinion of the Court of Appeals for the Third Circuit is reported at F. 2d (*infra*, p. 23).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1958 (*infra*, p. 28). On September 9, 1958, Mr. Justice William J. Brennan, Jr., entered an order extending the time for filing this petition for a writ of certiorari to and including November 29, 1958. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Where the vessel is taken out of a laid up status and after navigating under tow several hundred miles through navigable waters to a pier in navigable waters where the shipowner engaged an independent contractor to overhaul and prepare the vessel for sea:

1. Does the warranty of seaworthiness extend to the longshoremen engaged in the overhauling and preparation of the vessel for sea?

2. Is the non-delegable duty to provide a safe place to work an absolute one under the warranty of seaworthiness, or is it merely a non-delegable duty to use reasonable care?

3. Is the shipowner liable in terms of negligence under his non-delegable duty to use reasonable care, where, in the course of the overhauling of the vessel, an insecurely fitted pipe plug was precipitated out of the pipe when the water pressure was turned on by one of the repairmen, striking and injuring petitioner who was engaged in the overhaul of the vessel?

STATEMENT OF THE CASE.

Petitioner, a longshoreman engaged in the overhaul and repair of the respondents' S.S. "Mary Austin" was injured, allegedly due to the unseaworthiness of the vessel and the negligence of the respondents. This petition seeks a review of the judgment of the Court of Appeals for the Third Circuit dismissing the libel.

The facts, which are not in dispute, as found by the lower courts, disclose the following. The "Mary Austin" is a Liberty ship which had been laid up in Norfolk, Virginia, in the so-called "moth ball fleet" until the outbreak of the Korean War. In May of 1951 the Government removed the vessel from its laid up status and manned it with a crew of six men, a captain, chief mate, second mate, chief engineer, first assistant engineer and steward (App. 67b-68b). The vessel was then towed from Norfolk, Virginia, several hundred miles to the shipyard in Chester, Pennsylvania, where after an inspection and survey it was towed to Pier 5 in Philadelphia for overhauling and certain repairs. Two days later the vessel was shifted to Pier 9 in Philadelphia where the overhauling was continued to its completion. At no time was the vessel placed in drydock; the entire operation was performed while the vessel lay in navigable waters moored to the piers.

The overhauling and repairs was done by Atlantic Port Contractors, Inc., under a contract with the respondents. Petitioner was an employee of the contractor.

On November 21, 1951, while petitioner was working inside the low pressure cylinder of the main engine, he was struck suddenly by a pipe plug which had been precipitated downward from one of the overhead pipes. The court below found that the plug had been loosely fitted in its socket in an overhead pipe and was forced out when the water pressure was turned on (App. 25a).

Petitioner based his claim for recovery upon two grounds: (1) that the vessel was unseaworthy in that the

plug which had been insecurely fitted in the pipe was incapable of withstanding the water pressure; and (2) that under its non-delegable duty respondent was liable under theories of negligence because the repairmen were negligent in turning on the water pressure, and because respondent failed to warn anyone of the dangerous condition.

The trial judge found that the warranty of seaworthiness did not extend to petitioner because the nature of the work in which petitioner was engaged took him "out of the class of persons to whom the warranty of *complete* seaworthiness runs." The trial judge further related the duty to provide a safe place to work to concepts of negligence rather than the warranty of seaworthiness. In so doing, he held that the fact that the pipe plug had been insecurely fitted in the pipe did not in itself create an unsafe condition, but rather that the unsafe condition resulted only from the turning on of the water pressure by the repairmen. The trial court ruled that the duty to provide a safe place to work was non-delegable; nevertheless, it held that the shipowner could not be held responsible for the actions of the contractor in turning on the water which in turn caused the insecurely fitted pipe plug to be forced out causing petitioner's injury.

The Court of Appeals affirmed the district court. It held that the duty to provide a safe place to work was related to theories of negligence rather than the warranty of seaworthiness, and since the accident to West was occasioned by the negligence of a fellow worker, the shipowner could not be held liable despite its non-delegable duty in this respect. The court held further that the warranty of seaworthiness was not applicable to the case at bar because the "Mary Austin" was not a ship in navigation and the work in which petitioner was engaged was not seaman's work.

ARGUMENT.

First Point: The Decision of the Court Below Violates the Rule That a Vessel Under Repair in Navigable Waters Is a Vessel in Navigation and That the Warranty of Seaworthiness Extends to All Those Workers on the Vessel Engaged in Preparing Her for Sea. The Lower Courts' Decision in This Regard Conflicts With the Decision of This Court in North Pacific S.S. Co. v. Hall Bros., Etc., 249 U. S. 121; With the Decision of the Court of Appeals for the Second Circuit in Halecki v. United New York and New Jersey Sandy Hook Pilots Assn., 251 F. 2d 708 (2 Cir., 1957), cert. granted 26 L. W. 3355; With the Decision of the Fourth Circuit in United States v. Lindgren, 28 F. 2d 725, Affirmed 281 U. S. 38; and the Decision of Another Panel of the Third Circuit in the Case of Read v. U. S., 201 F. 2d 758.

A. The "Mary Austin" Was a Vessel in Navigation.

The trial judge in the case at bar held that the nature of the work performed by petitioner took him "out of the class of persons to whom the warranty of complete seaworthiness runs." It would thus appear that the trial judge erroneously considered the warranty to vary depending upon the type of work being performed at the moment in behalf of the vessel. This holding not only lacks support anywhere in the law, but it violates the many decisions of this court which hold that the warranty imposes an absolute duty which may not be qualified, and it applies to all those workers engaged on board the vessel in preparing her for her voyage or for sea. *Seas Shipping Company v. Sieracki*, 328 U. S. 85; *Pope and Talbot v. Hawn*, 346 U. S. 406. The Court of Appeals below went further than the trial judge and held that the warranty has no application

held that the vessel was not in navigation and that the nature of the work being performed was not such as to bring the men performing it within the scope of the warranty. Paradoxically, the court below attempted to distinguish a former decision of the same circuit, rendered by a different panel, in *Read v. United States*, 201 F. 2d 758, on the ground that the "amount" of work was different. Implicit in this distinction is the conclusion that the court otherwise agreed with the holding of the *Read* case, namely, that the vessel was in navigation while under overhauling and repairs, and that the nature of the work entitled the workers to the benefit of the warranty. The basic reasoning of the court below appears thus to be clearly erroneous on its face. A review of the authorities establishes beyond peradventure that the rule of law adopted by the court below is completely at variance with the universal rule adopted by this court and by the courts of appeals of other circuits.

The word "vessel" is defined so as to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation" (R. S. Sec. 3, 1 U. S. C. A. 3). The word "transportation" is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. *The International*, 89 F. 484, 32 C. C. A. 258 (Pa. 1898). Thus, barges, canal boats and other nondescript craft used in transportation having no mast or sails or motive power of their own are vessels in navigation within the admiralty jurisdiction. *Ellis v. U. S.*, 206 U. S. 246; *The Dick-Keys*, Fed. Cases No. 3898; *Kate Tremaine*, Fed. Cases No. 7622; *Southwark v. Raft of Railroad Crossties*, 40 F. 596; *Saylor v. Taylor*, 77 F. 476; *McRae v. Bowers Dredging Co.*, 86 F. 344; *The Ark*, 17 F. 2d 446. The foregoing authorities squarely contradict the holding of the court below and clearly establish beyond doubt that a vessel is in navigation whether or not she has any propelling machinery of her own so long as she is manned by a crew, even though it is

only a single individual on board tending to the needs of the vessel.

The court below attempted to buttress its position by holding that the vessel had no crew, despite the fact that she was manned by a captain and five other officers. The court reached this conclusion upon the premise that no shipping articles had been signed. Here again the gross error is patently manifest. It should be noted first that shipping articles are required to be signed only where a vessel is engaged in foreign or intercoastal commerce. 46 U. S. C. A. 564. This exempts from formal shipping articles before a commissioner all those numerous vessels which operate in coastwise trade and within the lakes, rivers and harbors.

In the case at bar, when the "Mary Austin" was taken out of its laid up status in Norfolk, it was manned by a captain, chief mate, second mate, chief engineer, first assistant engineer and a cook, all of whom were attached to the vessel and whose function was to look after the vessel's interest. When the vessel was navigating the Chesapeake and Delaware Bays and the Atlantic Ocean under tow, she was no less a vessel in navigation than any of the numerous barges which daily ply the same route under tow. See *Warner v. Norton*, 321 U. S. 565. Significantly, the respondents admitted that the captain and other men aboard the vessel were "members of the crew". In Supplemental Answers to Interrogatory No. 6, the respondents stated (1086):

> "The members of the crew of the SS Mary Austin were Master T. G. Karso, 56 Goble, Newark, New Jersey; Chief Officer A. A. Haus, 95 Beeckman Avenue, Tarrytown, New York; Second Officer Jerome L. Greenberg, 1904 South 36th Street, Omaha, Nebraska; Chief Engineer Arthur O'Connor, 42 Conyingham Avenue, Randall Manor, Staten Island, New York; First Engineer Charles Booth, 620 Gaul Street, Philadelphia,

Pennsylvania; Chief Steward Jose Salguero, 1017 Intervale Ave., Bronx, New York."

The captain and other officers of the vessel kept a log book containing detailed accounts of the events taking place on board the vessel. Regular watches were stood by these crew members and so recorded in the log books. While the vessel was berthed at the pier undergoing the overhauling and repairs, special night mates were engaged for the various watches on the vessel (109b). In all respects, the captain and the five other men, as aided by other relief personnel, performed the services regularly and ordinarily performed by members of the crew. The lower court's finding that these men did not constitute the vessel's crew is directly in conflict with the established authorities and the customary practice, and finds no support in any recognized authority. It makes no difference that the one or more men who constitute the crew signed the shipping articles; it is only essential that the men be attached to the vessel and serving the vessel's interests. *Warner v. Norton, supra.*

In support of its contention that the vessel was not in navigation, the court below relied upon this court's opinion in *Desper v. Starved Rock Drydock Co.*, 342 U. S. 7, which involved a fleet of small motorboats which had been hauled upon the shore out of the water for winter lay-over. While these boats were on shore an accident occurred and killed one of the individuals engaged in painting them. This court held that these boats were not in navigation at the time because *the boats were* not afloat. This court emphasized the fact that these boats were being made ready for the summer season and that after they were placed in the water the decedent might have been given the job of operating one of them, and held "for a number of reasons the ships might not be launched or he might not operate one. To be sure he was a probable navigator in the near future, but the law does not cover probable or

expectant seamen, but seamen in being . . . The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death." Thus, the basic factor which motivated this court's opinion in the *Despar* case was the fact that the vessels were laid up on shore out of the water and therefore completely out of navigation. There is no similarity whatever between that situation and the one at bar.

The error of the court below seems to have stemmed from the erroneous comparison of a vessel which is under overhauling and repairs to a vessel under construction which has not yet been launched. In *North Pacific S. S. Co. v. Hall Bros., etc.*, 249 U. S. 121, 126-127, this court distinguished between a vessel which is under construction and one which has previously been completed and thereafter is taken out of service for repair. This court on the point stated:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract . . . but the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed and launched. 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics liens created by state law, enforceable in state courts. In the baptism of launching, she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.' Tucker v. Alexandroff, 183 U. S. 424."

It is clearly erroneous, therefore, to say that a vessel, after having been completed and launched and then taken out of

service for repairs is out of navigation when in fact she is simply undergoing repairs in navigable waters in preparation for sea duty.

It is settled law that even where a vessel is in drydock, entirely out of service, for repairs, it is, nevertheless, construed to be in navigable waters because the drydock is considered to be part of the water rather than the land. In fact, this recognized rule was followed by another panel of the Court of Appeals below in the case of *Rogosich v. United Drydock and Repair Co.*, 67 F. 2d 377, where a vessel was taken into drydock for major repairs and one of the carpenters was injured while securing a plank to the frame of the hull. The extent of the repairs in that case were much greater than those in the instant case. The Court of Appeals for the Third Circuit held that the vessel was in navigable waters and that the injured worker had the status of a seaman, despite the fact that the injury occurred while the vessel was in drydock undergoing the repairs.

In the case at bar, the vessel remained in the water at all times with the captain and his crew in command of the vessel. At the time of the injury on November 21, 1951, the ship's equipment including the boilers, pumps and dynamos was in operation (49b), and the vessel was very close to being ready for sea. She sailed under her own power from the pier on December 12, 1951 (107b). The finding that the "Mary Austin" was not a vessel in navigation at the time of the accident violates the settled principles announced by this court and by the various courts of appeals. The authorities require the conclusion that she was a vessel in navigation and it remains to determine that those who were aboard preparing her for sea were entitled to the benefit of the warranty of seaworthiness.

B. *The Workers Engaged in Overhauling and Preparing a Vessel for Sea Are Entitled to the Benefit of the Warranty of Seaworthiness.*

"It has long been recognized that harbor workers engaged in repairing and refitting a vessel have the status of seamen, even though the vessel is taken out of service and placed in drydock for the repairs. Indeed, the Court of Appeals for the Third Circuit below recognized this doctrine long before the pronouncement of this court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85. In *Rogosich v. United Drydock and Repair Co.*, 67 F. 2d 377, a vessel was taken into drydock *for major repairs*, and one of the carpenters was injured while securing a plank to the frame of the hull. Judge Thompson, speaking for the Court of Appeals for the Third Circuit, classified the harbor worker as a seaman and outlined the basis of his right to recovery as follows (p. 378):

> "The libellant, while engaged in repairing a scow *on the respondent's dry dock* upon navigable waters, had the status of a seaman. Kuhlman v. W. & A. Fletcher Co. (C. C. A.) 20 F. (2d) 465. In the absence of statute, a seaman may recover compensatory damages in admiralty only upon proof of unseaworthiness of the vessel. Pacific S. S. Co. v. Peterson, 278 U. S. 130, 49 S. Ct. 75, 73 L. Ed. 220; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

This doctrine was attacked in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, and this court, after a painstaking analysis of the law, stated (U. S. p. 99):

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty

jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards.*" (Emphasis supplied.)

Notwithstanding the clear mandate of the Sieracki decision, attempts were thereafter made to limit its application only to those harbor workers engaged in loading and unloading vessels. This court in *Pope and Talbot v. Hawn*, 346 U. S. 406, repudiated that effort. There, a ship's carpenter was injured while engaged in repairing the vessel's loading equipment. In rejecting the attempts to limit the application of the *Sieracki* doctrine, this court said (U. S. pp. 412-413):

"We are asked to reverse this judgment by overruling our holding in Seas Shipping Co. v. Sieracki, (U S) supra. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided, this over-strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. That identical argument is repeated here. We reject it again and adhere to Sieracki. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave to Sieracki. These slight differences in fact cannot fairly justify the distinction

urged as between the two cases. *Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.*"

The decisions from other circuits involving the same factual premises are likewise in direct conflict with the decision of the court below in the case at bar. In *Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 251 F. 2d 708, cert. granted, 26 LW 3355, a similar set of facts was involved. There the vessel was taken to a pier in a repairyard for *annual overhaul and repairs*. It was then manned only by a watchman. Part of the work involved cleaning the ship's generators by spraying them with carbon tetrachloride, and one of the workers of the contractor who was so engaged met his death from the fumes of the carbon tetrachloride. Judge Learned Hand reviewed this court's opinion in *Sieracki* and subsequent decisions and made the following pertinent observations, which are clearly in conflict with the ruling adopted by the court below (pp. 711-712):

> "Quite a different question arises as to the *warranty of seaworthiness*, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. . . . In Guerrini v. United States, 2 Cir., 167 F. 2d 352, the ship, as in the case at bar, was moored in Brooklyn alongside a dock and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, did not apply. However, that was in 1948 before either Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, or Petterson v. Alaska S.S. Co., 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, was decided; *it is now clear that we were wrong both in limiting the warranty to those doing longshore-*

men's duties and in supposing that the surroundity of 'control' of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in Pope & Talbot v. Hawn, supra, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, which was carpenter's repair work."

The rule in the Fourth Circuit is likewise in conflict with the decision of the court below. In *United States v. Lucienne*, 28 F. 2d 725, affirmed 281 U. S. 38, the vessel had been laid up, as was the "Mary Austin" here, and repairs were being made to ready the vessel for sea. The worker was killed while engaged in the work of preparing the vessel for sea. Chief Judge Parker, speaking for the court, made the following analysis (p. 728):

"The Hybert had been laid up, it is true, but *some time prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage*. Decedent was employed as third officer and came on duty for the first time on the morning of his death. *At the time he received the fatal injury he was engaged in preparing the vessel for sea.*

"A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. Sec. 4612 (46 USCA Sec. 713). And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. In that case the court said: 'We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the

ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of business. If they should be protected in the one case they should be in the other.'

"Certainly seamen employed to take a ship to sea *who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time.* See The Progresso (D. C.) 46 F. 292; The William Leishear (D. C.) 21 F. (2d) 862." (Emphasis supplied.)

The same conflict which is thus manifest in the decision of the court below with decisions of the Courts of Appeals for the Second and Fourth Circuits, as above indicated, is also apparent within the Court of Appeals for the Third Circuit. Another panel of that court sitting in the case of *Read v. United States; supra*, 201 F. 2d 758, reached a contrary conclusion upon a set of facts analogous to those at bar. In the *Read* case the S/S. "Langdon Cheves" was being transformed from a liberty-type ship to a troop transport, and the shipowner engaged a general contractor to make the necessary alterations and repairs. This contractor in turn engaged a subcontractor to assist in the job of conversion, which entailed major changes and repairs. In that case, as in the case at bar, the contract between the shipowner and the contractor gave the latter complete control over the work and required the latter to take all of the necessary precautions for the safety of all those on board. In the course of the work, an employee of the subcontractor was injured while engaged in working in one of the four deep tanks in the lower hold of the vessel because of an alleged failure to provide adequate safeguards around the deep tanks and because of inadequate lighting. The Court of Appeals for the Third Circuit, in that case, held that it was unnecessary

to consider the question of the shipowner's negligence because the warranty of seaworthiness was clearly applicable in favor of the repairman. Said the court at page 761:

> "The Sieracki case also specifically stated that the vessel's obligation of seaworthiness extends to stevedores while working aboard the ship. In Hawn v. Pope & Talbot, Inc., 3 Cir., 1952, 198 F. 2d 800, we held that the *vessel's liability for unseaworthiness extended to a carpenter employed by one having a contract to repair the ship—as in the instant case.*
>
> "On the score of unseaworthiness we have already found that there were two or three defective lighting appliances on the main deck *which the libellant and other workmen tried to use but could not.* From that testimony it is reasonable to infer that these appliances were defective at the time the ship was turned over to the subcontractor since there is no evidence that those lights had been used by anyone during the day. *Clearly then, there was here a 'failure to supply and keep in order the proper appliances appurtenant to the ship.'* The Osceola, *supra.*
>
> "*We conclude, therefore, that there was a breach of the shipowner's warranty of seaworthiness.*" (Emphasis supplied.)

See also *Crawford and Lucibello v. Pope & Talbot, Inc.*, 206 F. 2d 784, wherein two shipcleaners were injured in the course of a cleaning operation on board the vessel. Chief Judge Biggs, speaking for the court, held the warranty to be applicable as follows (p. 790):

> "As to the question whether Crawford and Lucibello under the circumstances at bar were libellants in whose favor the doctrine of unseaworthiness should apply, we have no doubt that they were. *Their work in the deep tanks was clearly 'ship's work' within the meaning of the Sieracki case.*" (Emphasis supplied.)

The rule of law adopted by the Court of Appeals for the Third Circuit in the instant case is thus not only in conflict with the decisions from other circuits, but also with decisions of other panels within its own circuit. This court, therefore, should grant certiorari on the basis of this conflict in decisions alone, and in order to obtain uniformity of decision among the various circuits in the interpretation of this court's opinion in *Seas Shipping Company v. Sieracki, supra,* 328 U. S. 85.

Second Point: The Decision of the Court Below Converts the Non-delegable Duty to Provide a Safe Place to Work from the Warranty of Seaworthiness to a Question of Due Care Under Theories of Negligence. The Lower Court's Decision Is Thus in Conflict With This Court's Opinion in Mahnich v. Southern S. S. Co., 321 U. S. 96, and the Decision of the Court of Appeals for the Ninth Circuit in Pacific Far East Lines v. Williams, 234 F. 2d 378, and the Decisions of the Court of Appeals for the Second and Sixth Circuits Respectively in Poignant v. U. S., 225 F. 2d 595 and The Seeandbee, 102 F. 2d 577.

The conflict of decisions within the Third Circuit itself in the interpretation of the shipowner's liability under the duty to provide a safe place to work is most marked in the case of *Cookingham v. U. S.*, 184 F. 2d 213, where a seaman was injured as a result of an unsafe condition created by a foreign substance on a stairway. The majority in that case held that the duty to provide a safe place to work did not fall within the warranty of seaworthiness but merely involved the exercise of reasonable care. The shipowner was therefore exonerated on the ground that he did not have notice of the existence of the dangerous condition. This view of the majority was sharply criticised by the Court of Appeals for the Ninth

Circuit in *Pacific Far East Lines v. Williams*, 234 F. 2d 378, where that court took a contrary view. The doctrine of the Third Circuit was even more strongly repudiated by the Second Circuit in *Poignant v. U. S.*, 225 F. 2d 595, where the late Judge Frank, in a concurring opinion had this to say about the novel theory adopted by the Third Circuit in the *Cookingham* case in connection with the warranty of seaworthiness (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784, 789, 790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brabazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's decisions. I read my colleagues' opinion as repudiating it also.*" (Emphasis supplied.)

In *The Seeandbee*, 102 F. 2d 577, the Court of Appeals for the Sixth Circuit again related the duty to provide a safe place to work as part of the warranty of seaworthiness in these terms (p. 581):

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and *this does not depend on the exercise of reasonable care, but is absolute*. The H. A. Scandrett, 2 Cir., 87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to *supply and keep in order* proper appliances appurtenant to the ship

and the same rule applies for failure to provide a safe place in which to work. Cleveland Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262."

This court in *Mahnich v. Southern S. S. Co., supra*, 321 U. S. 96, wherein the liability was predicated exclusively on the warranty of seaworthiness under the maritime law before the Jones Act, likewise related the duty to the warranty in these terms (p. 102):

"In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee *with safe appliances and a safe place to work*, is non-delegable and not qualified by the fellow servant rule."

Both the trial judge and the Court of Appeals below conceded that the shipowner had a non-delegable duty to provide a safe place to work, but nevertheless exonerated the shipowner on the ground that this duty was related only to theories of negligence. Here again the court below departed from the long-established rule that the duty to provide a safe place to work is an inherent part of the warranty of seaworthiness, and the obligation under this doctrine is absolute and not dependent upon the exercise of reasonable care. *Seas Shipping Company v. Sieracki, supra*, 328 U. S. 85. The conflict between the decision in this case with the rule announced by this court and by other circuits, likewise, calls for a review of the matter.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
DEC 29
JAMES ... Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 11

EDGAR ALLEN WEST,
Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTORARI.

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IN THE

Supreme Court of the United States.

October Term, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent-Impleaded, Atlantic Port Contractors, Inc., respectfully prays that issuance of a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered on July 2, 1958 be denied.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D., Pa., 1956). The opinions of the United States Court of Appeals for the Third Circuit are reported at 246 F. 2d 443 (1957) and 256 F. 2d 671 (1958).

COUNTER STATEMENT OF THE CASE.

Petitioner, a shoreside engineer employed by respondent-impleaded, was injured on November 21, 1951 while working in the engine room of the S. S. "Mary Austin". He seeks a review of the judgment of the United States Court of Appeals for the Third Circuit which affirmed the action of the United States District Court of the Eastern District of Pennsylvania in dismissing the libel and the action over against the impleaded respondent.

The facts as found by the lower courts may be stated as follows. Following World War II, the "Mary Austin" had been completely deactivated and placed in the so-called "Moth Ball Fleet" (143 F. Supp. 473, 475).

During the Korean conflict the decision was made to reactivate her and she was brought to a pier in Philadelphia where the respondent-impleaded, having been awarded the contract, had complete charge of reactivation (143 F. Supp. 473, 475).

Petitioner was injured while working in the low pressure cylinder of the ship's main engine. He was hit on the knee by a metal plug from an overhead water pipe when some other employee of respondent impleaded turned on the water (143 F. Supp. 473, 476).

Contrary to petitioner's statement, the "Mary Austin" had no crew. While there were employees of the United States aboard the vessel, they had signed no Articles and were not aboard as a ship's crew but as inspectors assisting the Port Engineer to make sure that the work done was in accordance with the contract and specifications (143 F. Supp. 473, 475, 476).

ARGUMENT.

I.

A.

Petitioner asserts the existence of a rule holding that a vessel under repair in navigable waters is a vessel in navigation.

The cases he cites and relies upon fail to sustain the existence of such a rule.

All of the cases cited at page 6 of the Petition are concerned with the status of the craft involved, *e.g.*, dredges, scows, houseboats, etc. as "vessels" so as to be subject to maritime liens. None of the cases deals with what constitutes a "vessel in navigation".

The question of what constitutes a "vessel" should not be confused with the entirely separate and distinct concept of a "vessel in navigation".

The existence of a vessel as an entity begins when she is launched and continues so long as her identity is preserved. *Tucker v. Alexandroff*, 183 U. S. 424, 438 (1902). However, even when launched, a "vessel" does not become a "vessel in navigation" until she in fact is engaged in navigation and marine commerce. *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir., 1942), certiorari denied, 319 U. S. 746 (1943). When a vessel is withdrawn from navigation and commerce, although she retains her identity as a "vessel" for jurisdictional purposes, she has lost her character or status as a "vessel in navigation". *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952); *Autus v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir., 1939).

The concept of a "vessel in navigation" is not determined by whether or not she is afloat but rather from a consideration of all factors and circumstances surrounding the period in question. The trial judge found, 143 F. Supp. 473, 479:

> "The fact that the S. S. Mary Austin was afloat is not controlling; although, it should be noted that she most certainly was in her then condition not a navigable vessel. . . ."

The trial court then quoted from the *Despot* case, *supra*, to the effect that there was no vessel engaged in navigation.

It is plain that the "Mary Austin" was not physically able to operate in the functional manner for which she was designed. As previously noted, she had no crew. There was no showing that she possessed a Coast Guard certificate authorizing her to be in service or that she conformed to American Bureau of Shipping Standards.

The trial judge concluded that the "Mary Austin" was not a vessel in navigation and it is submitted that he was eminently justified in so concluding.

I.

B.

Petitioner cites and relies upon *Bogosich v. Union Drydock & Repair Co.*, 67 F. 2d 377 (3rd Cir., 1933).

Examination of the opinions of both the Court of Appeals for the Third Circuit and that of the District Court, the latter being appended as a footnote to the Circuit Court's opinion, fails to sustain the assertion made by petitioner that the vessel (a car float) was taken into dry dock *for major repairs*. Other than describing in detail the manner by which libellant was injured while securing a plank to the hull of the car float, the opinions are silent as to the nature and extent of the overall repairs.

While petitioner correctly quotes Judge Thompson, the statement made was purely obiter dictum. Analysis of the opinions clearly shows that the question of the status of the libellant as a seaman was not at issue. The real point involved were whether or not a seaman could recover on the basis of unseaworthiness under admiralty jurisdiction, his right under the Jones Act being barred by

the Statute of Limitations; and whether or not the respondent could assert negligence of fellow servants as a defense.

Petitioner states (p. 11):

> "It has long been recognized that harbor workers engaged in repairing and refitting a vessel have the status of seamen, even though the vessel is taken out of service and placed in drydock for the repairs."

Berryhill v. Pacific Far East Line, Inc., 238 F. 2d 385 (9th Cir., 1956), affirming 138 F. Supp. 859, certiorari denied, 354 U. S. 938 (1957), directly contradicts this statement. Berryhill, a shipyard employee, was injured by an exploding grinding wheel while carrying out major repairs to a ship in dry dock. The lower court granted defendant shipowner's motion for judgment on the pleadings on the grounds that the warranty of seaworthiness was not applicable. The Circuit Court affirmed. While in part the decision rested upon the fact that the ship was in dry dock and the grinding wheel belonged to the shipyard not the ship, the decision rests equally upon the reasoning that the nature of the work performed was outside of the scope of work performed historically or currently by a crew. The Court stated at p. 387:

> "The facts in this instant case would extend the doctrine of absolute liability for unseaworthiness, Mahnic v. Southern Steamship Company, 321 U. S. 96, 100 . . . , beyond any previous holdings. Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are 'ship's work,' to be performed, historically or currently, by the crew."

There is no conflict between the decision in the instant case and the holdings of this court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85 and *Pope and Talbot v. Hawn*, 346 U. S. 406. In each case the nature or type of work done and its relationship to the ship brought Sieracki and

Hawn within the doctrine of seaworthiness. The nature of the work performed by West and its relationship to the "Mary Austin" are not such as were historically or currently performed by the crew.

Decisions from other circuits involving the same factual situations are not in conflict with the decision of the court below.

Halecki v. United New York and New Jersey Sandy Hook Pilots Ass'n., 251 F. 2d 708 (2nd Cir., 1958) certiorari granted, 357 U. S. 903, was decided by the Second Circuit on the same day as *Berge v. National Bulk Carriers, Inc.*, 251 F. 2d 717 (2nd Cir., 1958) affirming 148 F. Supp. 608, certiorari denied, 356 U. S. 958. In *Berge*, the libellant, a shoreside repair worker, was injured aboard a vessel undergoing major interior repairs and alterations, alongside a pier, (148 F. Supp. 608), as was the "Mary Austin". The trial court (Judge Murphy) in denying a recovery on the ground of unseaworthiness followed the *Berryhill* decision, *supra*, and also the decision of the lower court in the case at bar.

In *Halecki*, the decedent was an employee of an electrical repair contractor engaged in using carbon tetrachloride to clean the generators of a vessel moored to a pier for annual overhaul and repairs. A majority of the Second Circuit felt that the nature of the work being performed was that traditionally of seamen, although it was also conceded that:

> "As might be expected, so shadowy a line of demarcation will in application produce inconsistent results". (251 F. 2d 708, 711.)

Halecki was argued before this Court on October 23, 1958.

It is submitted that the case at bar is more analogous to *Berge* than *Halecki*.

Petitioner's statement (p. 14) that "The rule in the Fourth Circuit is likewise in conflict with the decision of the court below" is incorrect. The case relied on, *United*

States v. Lindgren, 28 F. 2d 725 (4th Cir., 1928), affirmed, 281 U. S. 38 is not in point. The status of the decedent therein as a seaman (third officer) was admitted in the pleadings and conclusively determined thereby. The principal question involved was whether his administrator could recover under the Virginia death statute or whether the sole remedy was under the Merchant Marine Act of 1920.

Petitioner ignores the most recent and closely similar case in the Fourth Circuit, *Raidy v. United States*, 252 F. 2d 117 (4th Cir., 1958) affirming 153 F. Supp. 777, certiorari denied, 356 U. S. 973 (1958). In a per curiam opinion the Fourth Circuit adopted as its own the opinion of District Judge Chestnut. The latter had cited with approval and followed the decision of the trial judge in the case at bar. 153 F. Supp. 777, 780.

The *Raidy* case denied a recovery on the basis of either negligence or unseaworthiness to a shipyard worker who fell through a hole in a catwalk due to the absence of a footplate which was part of the major repair and replacement work being performed on the vessel, a seagoing dredge.

Finally, petitioner has asserted that the decision below is in conflict with two other decisions of the Third Circuit, *Read v. United States*, 201 F. 2d 758 and *Crawford and Lucibello v. Pope & Talbot, Inc.*, 206 F. 2d 784.

The *Read* case is distinguishable, as pointed out by the court below, on the amount of work involved.

The "Mary Austin" was a dead, completely deactivated vessel which had to be completely rehabilitated and repaired over a period from November 5 to December 11, 1951. In *Read*, the "*Langdon Chaves*" was undergoing structural alterations to change her cargo capacity from freight to troops. The contract called for the work to be done between May 23, 1944 and May 28, 1944, a period of five days. 201 F. 2d 758, 760.

In addition, although it does not appear in the opinion, the record in the *Read* case establishes that the ship was a "live" vessel in navigation with officers and crew aboard while the alterations were being carried out.

The *Crawford* case, *supra*, also involved a "live" ship which was in navigation with officers and crew aboard. That Crawford and Lucibello were doing seaman's work is clearly demonstrated by the following quotation from the court's opinion:

> ". . . At the very time Crawford and Lucibello were engaged in cleaning the deep tanks in No. 1 hold, seamen of the ship were similarly engaged in the deep tanks in an adjoining hold." (206 F. 2d 784, 790.)

There is no conflict with decisions from other circuits, on the contrary, the opinion of the court below is in harmony with decisions in the Second, Fourth and Ninth Circuits and in addition with the case of *Owens v. United States* 1958 A. M. C. 216 (S. D., Fla., 1957).

II.

The libel filed herein predicated liability upon the distinct and separate grounds of unseaworthiness and negligence.

We have previously demonstrated that under the applicable facts and appropriate law there was no vessel in navigation *and* the nature of the services performed by petitioner in relation to the vessel were not such as had been traditionally and historically performed by seamen. Petitioner, therefore, failed to make out a cause of action based upon unseaworthiness and dismissal of the libel on this ground was proper.

There is no conflict between the decision of the Court below and the decision of this Court in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96. *Mahnich* concerned injuries suffered by a seaman, while at sea, when a scaffold fell due to the breaking of a defective piece of rope supplied by the mate. The case deals solely with the question of seaworthiness; negligence as a separate ground or basis of recovery was not at issue.

The decision of the Court of Appeals for the Sixth Circuit in *The Secundbee*, 102 F. 2d 577 (1939) is in the same category as *Mahnich, supra*.

The assertion that the opinion of the court below and that of the Ninth Circuit in *Pacific Far East Lines, Inc. v. Williams*, 234 F. 2d 378, are in conflict is not correct. The *Williams* case involved injuries to a longshoreman, engaged in loading a refrigerator ship, who slipped as a result of moisture or frost on a bar recessed in the coaming of a hatch due to inadequate lighting.

In response to a contention by the shipowner that the moisture or frost was a "transitory" condition, the court did refer to the case of *Cookingham v. United States*, 184 F. 2d 213, affirming 87 F. Supp. 203, certiorari denied, 340 U. S. 935 (1951), as follows:

> "Assuming the doubtful proposition that the Cookingham holding is recognized in this circuit as persuasive authority, we see no analogy between it and the case before us." (234 F. 2d 378, 379.)

The alleged repudiation of the *Cookingham* case by the Second Circuit in *Poignant v. United States*, 225 F. 2d 595 (1955) is not correct. Neither Judge Hincks who wrote the majority opinion nor Judge Clark joined in Judge Franks' concurring opinion.

Although both the trial judge and the Court of Appeals did say that the shipowner had a non-delegable duty to provide a safe place to work, they did not exonerate the shipowner on the ground that this duty was related *only* to theories of negligence. Having adequately and properly disposed of the seaworthiness question, both of the Courts below proceeded to consider whether or not petitioner had shown any negligence upon the part of the respondent, United States. The trial court concluded that petitioner's injuries were caused by the negligence of an employee of Atlantic Port Contractors, respondent-impleaded, in turning on the water supply and thus causing the plug to come

out of the pipe. There was no negligence found on the part of the United States.

The alleged conflicts between decisions of this Court, other circuits and the court below do not exist.

III.

Petitioner takes the untenable position that the negligent act of the employee of respondent impleaded, Atlantic Port Contractors, was an act for which the respondent, United States, bears responsibility. He cites and relies upon *Dixon v. United States*, 219 F. 2d 10 (2nd Cir., 1955). It is submitted that the case is clearly distinguishable.

The status of petitioner, West, has been previously detailed.

Dixon was the Chief Officer of a vessel in commerce and navigation. He was injured during a voyage in a foreign port when the upper rungs of a ladder he was descending pulled out or broke. He was engaged in checking the lower rungs of the ladder which had recently been repaired by an independent contractor.

The "non-delegable" duty referred to in *Dixon* is that of a shipowner to use due care to maintain the seaworthiness of his vessel after she commences her voyage (219 F. 2d 10, 15, 16).

The owner of a dead, deactivated vessel has no obligation as in *Dixon* to a business invitee such as the petitioner in the case at bar.

CONCLUSION.

The basic issues involved herein have already been presented to this Court in the *Berryhill*, *Birge* and *Baidy* cases, *supra*.

This Court has uniformly denied certiorari in each of those cases.

The decision in this case of the Court of Appeals for the Third Circuit does not conflict with any decisions of this Court or of other Courts of Appeals.

For the foregoing reasons, it is respectfully submitted that the issues involved herein do no merit a review by this court, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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